STATE OF MICHIGAN

COURT OF APPEALS

RUSSELL ROY HALE, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED March 17, 2015
v	No. 323899 Lapeer Circuit Court Family Division
APRIL LYNNE HALE, Defendant/Counter-Plaintiff-Appellee.	LC No. 08-039809-DM

Before: MARKEY, P.J., and MURRAY and BORRELLO, JJ.

PER CURIAM.

In this custody dispute, plaintiff appeals as of right an August 21, 2014, trial court order wherein the trial court set aside its July 29, 2014 ex parte order granting plaintiff physical custody of the parties' minor children. In setting aside the July 29, 2014 order, the trial court reinstated its prior orders granting defendant physical custody of the children and changing the children's domicile from Michigan to Texas. Plaintiff also appeals the trial court's denial of his motion for reconsideration. For the reasons set forth in this opinion, we affirm.

I. FACTS

Plaintiff and defendant divorced in 2009. The parties had two children during the marriage. Under the judgment of divorce, the parties shared legal custody of the minor children, defendant was granted physical custody, and plaintiff was awarded parenting time. In June 2011, defendant filed a consent order for a change of domicile permitting defendant to move the children to Texas. On June 13, 2011, the trial court entered the order, which purportedly bore plaintiff's signature. In response, on September 9, 2011, plaintiff filed an emergency ex parte motion to rescind the order, arguing that he never agreed to the change in domicile and that defendant forged his signature on the consent order.

The trial court held a hearing on the matter on October 18, 2011, but could not determine whether the change in domicile was consensual. It rescinded the consent order, but allowed the children to remain in Texas and invited defendant to file a motion for a change in domicile. After a hearing on February 17, 2012, the trial court granted defendant's request to change domicile. The trial court also found that plaintiff had initially agreed to the change in domicile

and challenged the validity of his signature on the consent order after changing his mind about the arrangement. On April 17, 2012, the trial court entered an order granting the change in domicile and awarding plaintiff additional parenting time.

Plaintiff unsuccessfully appealed the order twice.[1] While his appeals were pending, he reported the alleged forgery to the Lapeer County Sheriff's Department. On June 21, 2014, a warrant was authorized for defendant's arrest for forgery. Defendant was charged as a third habitual offender based on two prior felony convictions.

On July 29, 2014, plaintiff filed an emergency ex parte motion for a change in domicile, custody, parenting time and child support based on the outstanding warrant for defendant's arrest. That same day, the trial court entered an ex parte order changing the children's domicile to Michigan, granting plaintiff sole legal and physical custody, and suspending defendant's parenting time.

On August 6, 2014, defendant objected to the July 29, 2014, ex-parte order, arguing in part that there was no change in circumstances sufficient to warrant opening the issues of custody and domicile. On August 21, 2014, the trial court held a hearing on the motion and determined that the issuance of the warrant was not proper cause or a change of circumstances as necessary to reopen the question of custody. It therefore set aside the July 29, 2014 order and subsequently denied plaintiff's motion for reconsideration. Plaintiff appeals that order as of right.

II. ANALYSIS

Under the Child Custody Act, MCL 722.21 *et seq.*, "[a]ll custody orders must be affirmed on appeal unless the circuit court's factual findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Gerstenschlager v Gerstenschlager*, 292 Mich App 654, 657; 808 NW2d 811 (2011), citing MCL 722.28. A party seeking to change a preexisting custody arrangement must first establish proper cause or a change of circumstances. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). We review a trial court's decision on whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard. *Dailey v Kloenhamer*, 291 Mich App 660, 665 n 1; 811 NW2d 501 (2011). Pursuant to this standard, the trial court's factual findings will be affirmed unless the evidence clearly preponderates in the opposite direction. *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006).

"Before modifying or amending a custody order, the circuit court must determine whether the moving party has demonstrated either proper cause or a change of circumstances to warrant reconsideration of the [prior] custody decision." *Dailey*, 291 Mich App at 665, citing

[1] See *Hale v Hale*, unpublished order of the Court of Appeals, entered June 6, 2012 (Docket No. 310072); *Hale v Hale*, unpublished order of the Court of Appeals, entered July 15, 2013 (Docket No. 312463).

MCL 722.27(1)(c). The moving party must demonstrate proper cause or a change of circumstances by a preponderance of the evidence, *Vodvarka*, 259 Mich App at 509, though the trial court is not required to conduct an evidentiary hearing on this threshold showing, *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). "Often times, the facts alleged to constitute proper cause or a change of circumstances will be undisputed," however, if the facts are in dispute, the trial court may "accept as true the facts allegedly comprising proper cause or a change of circumstances, and then decide if they are legally sufficient to satisfy the standard." *Vodvarka*, 259 Mich App at 512.

"To show a change of circumstances, the party must prove that 'conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed.'" *Shann v Shann*, 293 Mich App 302, 306; 809 NW2d 435 (2011), quoting *Vodvarka*, 259 Mich App at 513. "[N]ot just any change will suffice." *Vodvarka*, 259 Mich App at 513. Rather, a material change must be something other than the normal life changes that accompany a child's growth and development. *Id*. In addition, the party seeking the custody modification must present "at least some evidence that the material changes have had or will almost certainly have an effect on the child." *Id*. at 513-514.

Proper cause means that one or more appropriate grounds exists "that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Shade v Wright*, 291 Mich App 17, 23; 805 NW2d 1 (2010) (quotation omitted). As part of the proper cause showing, the movant must establish the existence of one or more appropriate grounds for legal action to be taken. *Shade*, 291 Mich App at 23. Those appropriate grounds should be relevant to the best interests factors identified in MCL 722.23. *Id*. Furthermore, the grounds "must be of such magnitude to have a significant effect on the child's well-being." *Vodvarka*, 259 Mich App at 512.

In his emergency ex parte motion, plaintiff identified the warrant for defendant's arrest as the central event requiring an immediate change in custody. On appeal, plaintiff expands his argument, citing defendant's "continuing pattern of illegal behavior" (i.e., her prior felony convictions) in addition to the arrest warrant, as the proper cause "and/or" changed circumstances warranting reconsideration of the custody arrangement.

Defendant's prior convictions, which occurred in 1992 and 1993, do not constitute a change of circumstances or proper cause. "[T]he change of circumstances must have occurred *after* the entry of the last custody order. As a result, the movant cannot rely on facts that existed before entry of the custody order to establish a 'change' of circumstances." *Id*. at 514 (emphasis added). While proper cause does "not necessarily" require the event at issue to have occurred after the entry of the last custody order, "a party would be hard-pressed to come to court after a custody order was entered and argue that an event of which they were aware (or could have been aware of) before the entry of the order was thereafter significant enough to constitute proper cause to revisit the order." *Id*. at 515. The prior custody order granting defendant's motion to change domicile was entered on April 17, 2012. Defendant's prior convictions occurred roughly 20 years before the entry of the order and therefore do not constitute a change of circumstances. Further, the prior convictions are not a proper cause to revisit custody because plaintiff could have known of them before entry of the last custody order.

Plaintiff also contends that defendant's alleged forgery of the June 13, 2011 consent order constitutes proper cause or changed circumstances. The alleged forgery does not constitute proper cause or a change of circumstances because it too preceded the last custody order. *Vodvarka*, 259 Mich App at 514-515. Moreover, the trial court found, after taking evidence on the forgery issue at two separate hearings, that plaintiff agreed to the change of domicile and challenged his signature on the consent order only after experiencing a change of heart. At most, the trial court noted that defendant "may" have added plaintiff's signature, but ultimately concluded that it "c[ould]n't tell" who signed the order. The trial court was free to reject plaintiff's claim that defendant forged his signature. See *Gagnon v Glowacki*, 295 Mich App 557, 568; 815 NW2d 141 (2012) (we give deference to the trial court's credibility findings on competing evidence). In short, the trial court did not err in refusing to reopen custody based on an event that plaintiff failed to show actually occurred.

The only event that did take place after entry of the April 17, 2012 custody order is the authorization of the warrant, which was issued on June 21, 2014. In this case, however, the trial court found that the issuance of the warrant, absent something more, did not constitute a change of circumstances or proper cause. This finding was not against the great weight of the evidence. Plaintiff offered no evidence that the issuance of the warrant has impacted, or will "almost certainly" impact, the children's lives. *Vodvarka*, 259 Mich App at 511-513. Plaintiff's concern that the children will witness defendant's arrest or that they will be left without a parent once defendant is jailed was, at the time of the motion hearing, speculative. See *id.* at 517 n 10 ("We utilize the phrase 'could have' not to invite speculation about facts that may arise in the future, but to signify that a court need not await some negative effect on a child before undertaking an examination of the child's best interest.") See, e.g., *Corporan*, 282 Mich App at 607-608 (the defendant's concern that the plaintiff and her child could be evicted did not constitute a change of circumstances where "the record d[id] not show that [the] plaintiff and the child were ever compelled to vacate their residence"). According to defense counsel's representations at the motion hearing, defendant planned to turn herself in that same day, and the prosecutor agreed that he would release her on bond. Plaintiff also presupposed that defendant will be convicted of forgery and that she will spend time in jail. Certainly, as the trial court stated, plaintiff may renew his motion to change custody in the event that defendant is incarcerated and the children are left without care. At the time of the motion hearing, however, defendant was capable of providing that care. The great weight of the evidence supported the trial court's finding that the issuance of the warrant was neither proper cause nor a change of circumstances sufficient to reopen the question of custody. *Dailey*, 291 Mich App at 665 n 1.

Plaintiff also contends that the trial court abused its discretion in denying his motion for reconsideration.

"We review a trial court's ruling on a motion for reconsideration for an abuse of discretion." *Corporan*, 282 Mich App at 605. "An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

The party seeking reconsideration of a trial court's order "must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of

the motion must result from correction of the error." MCR 2.119(F)(3). If the movant merely reiterates the same issues ruled upon by the trial court, the motion should be denied. *Id*.

In his motion for reconsideration, plaintiff alleged: (1) that because defendant forged the consent order, she must also have perjured herself when she testified that she witnessed plaintiff sign the consent order; and (2) that "[o]ne of the minor children has indicated that [d]efendant mother has utilized her to forge her father's signature on multiple documents in the past, as a matter of due course." The remainder of the motion repeated plaintiff's concern that defendant was an inappropriate influence on the children and will leave them parentless once incarcerated. These arguments are, "by reasonable implication," a mere reiteration of the same issues that the trial court ruled upon in its decision to set aside the July 29, 2014 order. See MCR 2.119(F)(3). Accordingly, the trial court properly denied the motion for reconsideration. *Id*.

Affirmed. No costs awarded. MCR 7.219(A).

/s/ Jane E. Markey
/s/ Christopher M. Murray
/s/ Stephen L. Borrello